IN THE SUPREME COURT OF IOWA

No. 19–1109

Polk County No. CVCV058127

ORDER

BOB RUSH, BRIAN MEYER, RICK OLSON, MARY MASCHER, ART STAED, LIZ BENNETT, MARK SMITH, JO OLDSON, MARY WOLFE, MARTI ANDERSON, LEON SPIES, and **MARTIN A. DIAZ,**
Plaintiffs-Appellants,

vs.

GOVERNOR KIMBERLY K. REYNOLDS, GLEN DICKINSON, LESLIE HICKEY, and **DAN HUITINK,**
Defendants-Appellees.

A judge presented with the motion for recusal based on specific claims of judicial conduct has two basic obligations. First, the judge must make a record that discloses all relevant facts and circumstances relating to the claim of disqualification. *See State v. Smith*, 242 N.W.2d 320, 323–24 (Iowa 1976). This disclosure requirement not only relates to the need to maintain public trust and confidence in the court system, but also goes to the basic guarantee of a fair trial. *See In re Howes*, 880 N.W.2d 184, 193–94 (Iowa 2016). It also recognizes recusal is self-enforcing, and a judge has a duty to consider any circumstances that would justify disqualification, not just those known to a party. *See* Iowa Code of Judicial Conduct Rule 51:2.11 cmt. 2; *Forsmark v. State*, 349 N.W.2d 763, 767–68 (Iowa 1984). Second, the judge must then consider whether a reasonable person with knowledge of all the facts and circumstances would conclude that

the judge's impartiality could reasonably be questioned. *In re Howes*, 880 N.W.2d at 194. This involves an objective in-depth search of the conscience of each judge. *Smith*, 242 N.W.2d at 323–24. If the standard is met, recusal is required. Judicial disqualification is not normally discretionary when the standard is met. It is mandatory. Iowa Code of Judicial Conduct Rule 51:2.11(A); *see also In re Howes*, 880 N.W.2d at 194 ("The rule's mandatory nature is clear from its language . . . .").

The grounds for recusal asserted in the motion filed in this appeal relate to whether any justice of the Supreme Court consulted with, advocated with, or encouraged in any nonadministrative manner any named defendant (Governor Kimberly Reynolds, Glen Dickinson, Leslie Hickey, and Dan Huitink), any staff member of a defendant, or any member of the legislature to support passage of Senate File 638. The motion plainly asks if any justice was involved with the Governor's Office or the Legislature in the planning or efforts to secure passage of the bill. Conversely, however recusal must also address conduct in opposition to the bill. Therefore, with respect to the claim of recusal, I will first disclose my conduct relevant to the bill at the center of this litigation, then determine if recusal is needed to protect public trust and confidence in the judicial system.

I. Disclosure of Background Information.

Prior to the start of the 2019 legislative session, I began to hear that the Governor and certain legislators may seek statutory changes to Iowa's merit selection process. I was not in any way a part of any of these presession discussions; was never consulted in any way by any of the defendants, their staff, or any member of the Legislature about such a proposal; and was not aware that any member of the Iowa Supreme Court or the

Judicial Branch was involved in such discussions. Instead, from the earliest time, I indicated the Supreme Court would take no position on the issue and would defer to the legislative process and public discourse to decide the matter. I discussed this position with the justices of the Supreme Court, and they expressed agreement. The primary reason the Supreme Court takes such a position is because it is the branch of government often responsible to decide legal challenges to legislation and must normally maintain its neutrality. This position also reflects respect for the separation of powers in our government.

As has been my practice since I became Chief Justice in January 2011, I maintained office hours at the Capitol Building every Monday morning during each legislative session. The purpose of these office hours has been to make myself available to legislators to stop in and discuss any concerns about our court system and to answer questions. It has also been my practice to meet with legislative leaders in their offices at the Capitol during the session and at other times of the year to discuss the administration of justice in Iowa.

II. Disclosure of Contacts with Legislators.

I began my office hours at the Capitol during the 2019 legislative session on Monday, January 28, 2019. I was always accompanied by my counsel, Molly Kottmeyer, and the Director of Government Affairs for the Judicial Branch, attorney Caitlin Jarzen. During the 2019 session, I met with dozens of legislators during my office hours, and many times they were accompanied by their staff. On a few occasions, legislators asked about the proposed changes to the merit selection statute, and during the session, some

legislators approached me at various times and locations to tell me they were opposed to the bill. Molly Kottmeyer and Caitlin Jarzen also had several requests for information about the judicial selection process in Iowa from legislators and lobbyists. For example, legislators would contact them to ask questions about the operation of the merit selection process. On all of these occasions, we declined to discuss the merits of the bill and expressed the Supreme Court position to defer to the judgment of the legislature.[1]

On Monday, February 4, 2019, a state senator and representative asked to meet with me during my office hours at the Capitol. They presented me with a 35-page bill to overhaul Iowa's merit selection system. Additionally, the last section of the bill terminated my current eight-year term as Chief Justice on January 15, 2021, and changed future terms of the Chief Justice to two years. The merits to the bill were not discussed, and the meeting was described as a courtesy call prior to a public announcement of the bill that afternoon. This meeting was the first time I saw the bill or was actually aware of its existence.

Because the bill had a major impact on the Judicial Branch, I instructed my counsel, Molly Kottmeyer, and Government Affairs Director, Caitlin Jarzen, to generally monitor the bill and provide me with periodic reports on its activity. Molly Kottmeyer did not confer with legislators to carry out this directive, but did occasionally contact bar and legal associations who were following the bill. We were interested in the source and

[1]On one occasion in March 2019, at the conclusion of a meeting with a representative on the Judicial Branch budget, I did express my disappointment to him that the Legislature was seeking to eliminate my current term as Chief Justice as a part of the Merit Selection Reform Bill. I inquired into any rationale for that portion of the bill and if I might have done something to warrant such a provision in the bill.

strength of both the support of and the opposition to the bill, as well as the steps the proponents and opponents were taking. We also followed the public reaction to the bill, as documented in newspapers, as well as newspaper editorials that were written concerning the bill. As the legislative session progressed, reports were received indicating the House did not have enough support from its members for the bill to secure its passage. From time to time, I would inform the members of the Supreme Court of these reports, including on April 23, 2019. On that occasion, I informed the justices that we were hearing the proponents of the bill might seek to put some form of the bill into the Standings bill at the end of the session, but that the resistance in the House seemed solid. I also informed the justices the session was expected to end by the end of the week.

On Thursday, April 25, I traveled to Williamsburg, Virginia, to meet with the President of the National Center for State Courts and to attend the meeting of the Board of Directors of the National Center for State Courts on April 26. I am a member of the Board. I had no intention or plans to communicate with anyone about the bill during this time other than my counsel, Molly Kottmeyer.

On the evening of April 25, I was informed by a telephone call from Molly Kottmeyer that the status of the opposition to the bill was unchanged and that Capitol observers did not believe the bill had enough votes to pass. I told her to contact me by phone the next day, if needed, even though I would be in meetings all day.

While attending the Board of Directors meeting on Friday, April 26, I received a phone call late in the morning from Molly Kottmeyer. She was in Harlan, Iowa,

attending a meeting of the task force on the implementation of the Family First Act. She informed me that a particular member of the House of Representatives had some questions about the bill and wanted to speak to me. I was provided her telephone number and called this particular representative. Her questions were directed to the two-year Chief Justice provision of the bill and its impact on me and the ability of future Chief Justices to assume future leadership roles in the Conference of Chief Justices if Iowa changed the term of Chief Justice to two years. I answered her questions and discussed some issues I felt she might want to consider about the proposal to change the term of the Chief Justice to two years. I concluded the conversation by telling her that the decision was for the Legislature, and the Supreme Court would defer to its judgment. At the same time, I concluded the conversation with the a clear understanding from her questions and comments that she was no longer aligned with her prior, consistent public opposition to the bill.

I promptly reported my conversation to Molly Kottmeyer, and we discussed what I should do in response. We decided I should call another representative, who had personally told me and had publicly announced that he was opposed to the two-year Chief Justice term in the bill, to let him know that I just spoke to the other representative and to ask if he also had questions about the bill. As with the first conversation, his questions and comments led me to believe he too no longer opposed the two-year Chief Justice term in the bill. As I did with the first representative, I answered his questions and mentioned how the proposed reforms could impact the Judicial Branch. As with the

first representative, I concluded the conversation by telling him the decision was for the Legislative Branch, and the Supreme Court would defer to its judgment.

I again conferred with Molly Kottmeyer by phone. We discussed possible responses to this development, including changing our neutral position with respect to the two-year term of Chief Justice because of its direct impact on the internal operation of the court and because it was in direct contravention to the authority exercised by the court in electing me to an eight-year term as Chief Justice in 2016. We decided the best course of action would be to call a third representative to get his sense of these developments. This representative is the chair of a committee that helps oversee the court's budget, and of all legislators, he is the one I maintain most contact with throughout the year. I was provided his telephone number and called but was unable to get through.

I again consulted with Molly Kottmeyer by phone, and we decided to see if she could make some phone calls and acquire any additional information before taking any further action. Approximately ten minutes later, I received a phone call from an attorney. He told me that he had just concluded a phone call with the first representative I had called that morning. He said she told him that current justices on the Supreme Court are telling legislators that they think the bill is good policy and should vote for it.

I immediately called Molly Kottmeyer to report this conversation. She said it was consistent with what she was starting to hear from Capitol observers. We decided I needed to promptly address this matter with the Supreme Court. I then called a justice on the Supreme Court and reported what I had heard. He generally confirmed the report. I promptly ended the conversation and conferred with Molly Kottmeyer. In light of this

development, we concluded I could not pursue any form of a legislative response but needed to remain totally out of the process. We concluded any further involvement by me in the legislative process would be seen as political and would only expose a fractured Supreme Court and risk inflicting greater damage on the court as an independent institution of government.

Later in the afternoon, the representative who I was unable to reach by phone in the morning returned my phone call. I thanked him for returning the call but told him that I had discovered information in the meantime that no longer made it relevant for me to discuss the matter with him. I thanked him for his support during the session and the brief phone call ended.

Still later in the afternoon, Molly Kottmeyer called to tell me that another representative wanted me to call him. This was shortly after the Standings bill was finally introduced with the final version of the final bill that was ultimately passed into law. I was provided his telephone number and called him. He wanted to know what I thought of the amendment in the Standings bill concerning the modified changes to the merit selection bill. I told him I was staying out of the process and had no comments to offer. Since that time, I have not discussed the merit selection bill that was passed into law with any legislator.

III. Disclosure of Contact with the Governor and Staff.

My duties as Chief Justice bring me into contact with other government leaders throughout the year. In fact, I have worked hard to facilitate relationships with the other branches of government and have consistently tried to build bridges that allow the three

branches of government to work better to serve the interests of all Iowans. Prior to and during the last legislative session, I had several contacts with the Governor and staff of the Governor in my duties as Chief Justice. However, I never spoke with the Governor about the merit selection reform bill, or her staff.

In December 2018, I briefly exchanged holiday greetings with Governor Reynolds at her annual holiday gathering at Terrace Hill for department heads, judges of the Court of Appeals and justices of the Supreme Court. Again, nothing was discussed on these occasions concerning the judicial selection process or any changes to the current process.

In March 2019, I met with Governor Reynolds at Terrace Hill over breakfast. This meeting was part of regular meetings I have had with Governors each year to discuss the general operations of our branches of government. In the March meeting, I was accompanied by Molly Kottmeyer and Court Administrator Todd Nuccio. She was accompanied by her counsel, Sam Langholz, and deputy legal counsel, Michael Boal. We met for approximately one hour and discussed several issues relating to the courts and the Judicial Branch. However, I did not raise or discuss the pending judicial selection bill, and the Governor did not mention it either.

I spoke to Sam Langholz a few times prior to the legislative session and during the legislative session about pending judicial appointments, but never discussed the judicial selection bill or any issue relating to it. I also spoke with former counsel and chief of staff Ryan Koopmans on January 18. He informed me it was his last day of work for the Governor, but we did not discuss the subject of judicial selection or any matters relating to any reforms to the current system.

IV. Disclosure of Contacts with Others.

I did have conversations and contacts with many lawyers, lawyer associations, and representatives of lawyer associations throughout the legislative session, as well as contacts with members of the public concerning the issue of judicial selection. As Chief Justice, I have many contacts with people on matters concerning the administration of our courts as a regular part of my administrative responsibilities. During the past legislative session, the pending bill was a particularly active topic of conversation with the legal community. Lawyers and judges, as well as members of the public, would commonly voice their opposition to the bill to me, as they have done on other important issues affecting the courts. My response was generally to thank them for their interest and willingness to be involved in matters affecting the courts. In speaking to lawyer groups during the legislative session, I took the same approach and always made it clear that the Supreme Court was taking no position in the debate.

Similarly, all contacts pertaining to the pending bill that my counsel, Molly Kottmeyer, and I had with bar representatives were only to monitor the bill and the active debate over the bill. As with the context with all people concerning the issue of changes to the judicial selection process, we made it clear that the Supreme Court was taking no position on the matter and we would leave it to others to engage in the debate and the democratic process. My contacts with all people at all times was consistent with this approach.

V. Recusal.

Whether recusal is required in the case comes down to the facts, and a judge who is called upon to account for those facts has an obligation to make a full and complete record so the decision can be understood with transparency and the trust and confidence of the court system can be preserved. With respect to the claim for recusal asserted by the plaintiffs in its motion for recusal, I conclude I did not engage in conduct that supports my disqualification to sit on this case. At all times, I engaged in administrative duties as Chief Justice and did not engage in any conduct that would cause a reasonable person with knowledge of all the facts and circumstances to conclude that I could not decide the issues on appeal fairly and impartially.

Nevertheless, my actions are not the only matter for me to consider in determining if I have a duty to disqualify. The new law at the center of this litigation and its impact on my current term as Chief Justice must also be considered, even if not raised in the motion. Disqualification to sit on a case is a self-enforcing responsibility for a judge.

In this case, the new law at the center of this appeal reduced my eight-year term as Chief Justice given to me under the law in 2016 pursuant to an election by the justices of the Supreme Court. The new law changed this elected eight-year term by terminating it on January 15, 2021, and instituting a two-year term going forward, effectively reducing my current elected term by three years. Because this portion of the new law at the center of this appeal took away a right given to me by a legal process to serve an eight-year term, I conclude recusal is required because a reasonable person could conclude that I have a personal interest and financial interest in the outcome of this portion of the appeal

and could not fairly and impartially decide any matter concerning the disposition of the claims raised on appeal that affect the term of the Chief Justice.[2] The financial interest at stake is tied to the difference in the salary of the Chief Justice and the salary of an Associate Justice.

VI. Conclusion.

It is not easy to address the issue raised by the motion to recuse, but the risk of not doing so would be far worse. In the end, it is most important that the issue be resolved in a way that not only serves justice, but preserves public trust and confidence in the courts.

Accordingly, I deny the motion for recusal based on the grounds set forth in the motion. However, I grant the motion sua sponte for reasons not urged in the motion but explained in section V of this order.

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[2]The State filed a late response to the motion suggesting recusal was unnecessary under the doctrine of necessity and because the appeal can be resolved on standing grounds without addressing the underlying merits of the case. While the lateness of the motion presents its own concerns, the grounds urged by the State for nonrecusal have no merit. First, the doctrine of necessity has no application until necessity is present. This will not be known until all justices have decided the motion. No necessity will arise if enough justices remain after considering the pending motion. Second, when a justice is disqualified, that disqualification would apply to the issue of standing just as it would to issues and claims on the merits of the appeal.

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IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
19-1109	Rush v. Reynolds

So Ordered

Mark S. Cady

Mark S. Cady, Chief Justice

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